

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

David Jenkins,

Plaintiff,

Hon. Hugh B. Scott

06CV795A

v.

**REPORT and
RECOMMENDATION**

Steven Kruppner et al.,

Defendants.

Before the Court are the defendants' motions seeking partial dismissal of the Second Amended Complaint. (Docket No. 25 & 30).

The Second Amended Complaint in this case alleges that the defendants were deliberately indifferent to his medical needs because they refused to use alternative methods to cuff him, thus, exacerbating his carpal tunnel symptoms. Named as defendants are Steven Kruppner, G.J. Krempasky, J. Schmidt, T. Eagen, Nancy O'Conner Ryerson, Jane Doe 1, Mary Burrell, Catherine Felker, Mr. Vanhorn, Mr. King, Mr. K. White, Mr. T. Territo, Mr. Adams, Mr. K. *00*sk, John Doe 1, John Doe 2, Mr. Brooks, Mr. T. Brown, Mr. P. Zawadski, Mr. R. Spink, Mr. Gregory, Mr. M. Roberts, Mr. Clarence George, Mr. Gary Butters, Mr. N. Surauger, Mr. Deiter, John Doe 3, John Doe 4, Mr. W. Ferrell, and John Does 5-10.

Defendants Steven Kruppner, Gerard Krempasky, Catherine Felker, John Schmidt (Docket No. 25), Thomas Territo, Mary Burrell, Keith White, Theo Brown and Michael Brooks (Docket No. 30), move to dismiss the Second Amended Complaint to the extent that it asserts claims against the defendants in their individual capacity under Title II of the Americans with Disabilities Act (“ADA”) and §504 of the Rehabilitation Act. The defendants assert that the plaintiff may not bring claims against the defendants in their individual capacity under those statutes. (Docket No. 26 at page 2-3; Docket No. 31 at page 2-3).

The plaintiff does not oppose dismissal of the claims against the defendants in their individual capacity inasmuch as his request for injunctive relief was previously denied. (Docket No. 36). In light of the above, it is recommended that the motions to dismiss the Second Amended Complaint be granted to the extent that the plaintiff asserts claims against the defendants in their individual capacity under the ADA or §504 of the Rehabilitation Act.

Pursuant to 28 U.S.C. §636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy of the Report & Recommendation to all parties.

ANY OBJECTIONS to this Report & Recommendation must be filed with the Clerk of this Court within ten(10) days after receipt of a copy of this Report & Recommendation in accordance with 28 U.S.C. §636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, as well as W.D.N.Y. Local Rule 72(a)(3).

FAILURE TO FILE OBJECTIONS TO THIS REPORT & RECOMMENDATION WITHIN THE SPECIFIED TIME, OR TO REQUEST AN EXTENSION OF TIME TO FILE OBJECTIONS, WAIVES THE RIGHT TO APPEAL ANY SUBSEQUENT ORDER

**BY THE DISTRICT COURT ADOPTING THE RECOMMENDATIONS CONTAINED
HEREIN.** Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed2d 435 (1985); F.D.I.C. v. Hillcrest Associates, 66 F.3d 566 (2d. Cir. 1995); Wesolak v. Canadair Ltd., 838 F.2d 55 (2d Cir. 1988); see also 28 U.S.C. §636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, and W.D.N.Y. Local Rule 72(a)(3).

Please also note that the District Court, on *de novo* review, will ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. See Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co., 840 F.2d 985 (1st Cir. 1988).

Finally, the parties are reminded that, pursuant to W.D.N.Y. Local Rule 72.3(a)(3), “written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority.” **Failure to comply with the provisions of Rule 72.3(a)(3) may result in the District Court’s refusal to consider the objection.**

So Ordered.

/s/ Hugh B. Scott
United States Magistrate Judge
Western District of New York

Buffalo, New York
September 21, 2009